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BY E-MAIL & U.S. FIRST CLASS MAIL

Cynthia E. Catri, Esq.
U.S. Environmental Protection Agency
Region 1
5 Post Office Square
Suite 100 (OES04-2)
Boston, Massachusetts 02109-3912

Re: Aerovox Facility – Remediation Pursuant to M.G.L. c. 21E

Dear Ms. Catri:

AVX Corporation (“AVX”) is extremely disturbed by your letter of October 5, 2017 on the above-referenced subject. The letter raises two principal issues and then levies a dire threat against AVX of reopened liability at two sites at which AVX has spent hundreds of millions of dollars to enter into settlement agreements with EPA (and MassDEP and the City of New Bedford) and to perform its obligations thereunder.

The first issue raised by EPA concerns AVX’s proposed remedy for the Aerovox Facility. This letter – along with EPA’s subsequent correspondence of October 20 – continues EPA’s efforts to insert itself into the midst of a cleanup being conducted competently, efficiently and successfully, a cleanup that has been and remains fully compliant with M.G.L. c. 21E, the Massachusetts Contingency Plan (“MCP”) and the Administrative Consent Order governing its performance.¹ EPA criticizes a remedial alternative that has been proposed, but not yet approved by MassDEP, the regulatory body currently overseeing the cleanup. Given the technical nature of EPA’s comments, particularly in its October 20 letter, AVX plans to address them separately.

The second issue involves the apparent effort to fault AVX for the fact that pending completion of the source control remedy at the Aerovox Facility, EPA believes there will be impacts on the harbor and, according to EPA, on the harbor cleanup schedule. There are several points AVX makes in rejoinder to such position.

¹ It also continues EPA’s resistance to utilization of what might be considered an innovative remedial technology (i.e., a permeable reactive barrier) in a marine environment, in favor of remedial approaches with prohibitive costs and perpetual operation and maintenance. This is reminiscent of EPA’s rejection of the use of CAD cells in NBH in 1989, only to reverse its position 21+ years later.

1. AVX has already debunked EPA's cited evidence. EPA asserts (in a footnote) that it has previously notified AVX that it considered sheens that appeared in the harbor along the Aerovox shoreline to be a release to the harbor caused by AVX's actions taken during the 21E cleanup.² We remind you that at the time, AVX immediately rebutted EPA's allegation, stating that the source of the sheens was the sediments on the seaward side of the sheet pile wall.³
2. As a matter of fact and law, it is well known that there may be continuing groundwater releases pending completion of source control measures. Even if EPA's preferred remedy for the Aerovox site were selected, this would still be the case. Though AVX had no responsibility for sheens in the river in September 2016, no work can proceed in this location without at least some releases to the harbor because contamination is leaving and entering the Aerovox site every day due to tidal flow. The Immediate Response Action implemented at the site was an important step required by MassDEP to address the source area, but only when the Aerovox remedy is fully implemented will source control become effective. As a matter of law, this is usually a non-issue because the area where contamination comes to be located is part of the same site. It is EPA's gerrymandering that creates any potential problem here. EPA's unprecedented and unfathomable decision in the 1980s to separate the source area from the harbor site as a whole, followed by years of inaction regarding appropriate assessment and remediation of the source area, set the stage for the current situation.
3. There are many ways in which EPA, not AVX, is responsible for lengthy delays in the New Bedford Harbor cleanup. In this context, we note only that it is EPA that delayed the commencement of the 21E/MCP activities for one year by holding up approval of the building demolition NTCRA completion certification.

² See September 15, 2016 (4:45 pm) email from Ginny Lombardo, EPA's then project manager, to Marilyn Wade, AVX's licensed site professional.

³ The September 22, 2016 letter to EPA stated in relevant part:

AVX vehemently denies that there are or have been any releases from the Aerovox facility, i.e., from the landward (western) side of the sheet pile wall, to the Acushnet River. The source of the sheens that have been noted by observers during performance of sheet pile driving on September 13 and 14 is the sediments on the seaward (eastern) side of the sheet pile wall. The constituents of the sheen are not known. Further, they have been *de minimis* and transient, evaporating within a couple of minutes. As MassDEP has noted, these sheens appear routinely on the river, independent of activities at the Aerovox facility. In addition, there is no correlation between the appearance of the sheens and the level of pile driving activity occurring at the site.

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Most significantly, the October 5 letter, in reminding AVX of the proximity of the Aerovox site to the New Bedford Harbor site and the potential for work on one site to impact the other, makes a very strong statement warning AVX that it could incur liability for a new release to the harbor. AVX takes strong exception to EPA's posture for a number of reasons. It is unclear from the warning whether EPA means AVX faces liability under (1) the June 3, 2010 Administrative Order by Consent between EPA and AVX ("AOC") involving performance of a non-time-critical removal action at the Aerovox Facility; (2) the 1992 Consent Decree and the September 19, 2013 Supplemental Consent Decree with respect to the harbor; and/or (3) federal law other than CERCLA. There is no warning to be found in the AOC, as none of the reservations in paragraph 120 could be triggered in the course of performing work at the Aerovox site. Nor in the Supplemental CD, as none of the reservations in paragraph 16 could be triggered.⁴

Nonetheless, AVX takes the warning quite seriously. EPA's threats place AVX in the untenable position of implementing work to comply with state law while simultaneously risking noncompliance with federal law. Given this dilemma, AVX has no choice other than to seriously consider all options in addition to vigorously defending itself in the future when or if EPA asserts the same position via order or court proceeding. This includes potentially suspending all remedial work and/or seeking a judicial declaration as to which legal master AVX must follow, MassDEP or EPA, and whether compliance with MassDEP's directions can ever give rise to federal liability.

We must also note that the new disclosure of EPA's plan to install an interim sediment cap, with no further detail, raises far more questions than it answers, and raises significant concerns on AVX's part about EPA's stated intention to cooperate in coordinating remedy implementation.

Please do not hesitate to call if you have any questions or wish to discuss anything raised by the above.

Very truly yours,



Gary L. Gill-Austern

⁴ In a telephone conversation on October 5, 2017 shortly after electronic transmission of a copy of the letter to me, you informed me that paragraph 16.C. of the Supplemental CD could be invoked should a determination be made that there has been a release from the Aerovox site to the New Bedford Harbor site.

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cc (*by email*):

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